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Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace as Justice

Cover Page Footnote

Professor of Law, Georgetown University Law Center, Director, Georgetown-Hewlett Program in Conflict Resolution and Problem Solving. Thanks to my research assistant and student, who is also my teacher, Joshua Eizen. A good portion of this essay was written just before September 11, 2001, and the rest of it was completed afterward. I have begun to think that all "texts" will suffer from a new "deconstructive" and interpretive frame-things written before and after 9/11/01. To call for problem solving and peacemaking in lawyering here seems to heighten this interpretive issue of when fights, wars and resistance are important and when peace and more conciliatory problem solving are appropriate. I hope that as these events scar us and rearrange the salient "memes" in our heads we will continue to explore the complexities of analyzing responses to different kinds of conflicts, disputes and problems in the world. On the one hand, internal, domestic legal disputes are different from international conflict and terrorism. On the other hand, since I believe we are now fighting our first "post-modern" war in which nation-states and clear "adversaries" are not coherent but more multi-national and "viral," the powerful memes and metaphors we use to try to understand what has happened and what should happen will likely "spill over" into many different areas. (Are we to appreciate our "oneness" with our fellow sufferers and citizens or be ever "alert" to the possible "treason" of a seemingly peaceful member of our community?) As a Manhattan-born New York native and current citizen of the nation's capital, I dedicate this article to the victims, rescuers, family members and all of us who have suffered from the extreme and painful conflict and damage visited upon us by the terrorists. I continue to dedicate my professional life to the hope that we can still create a world which is both peaceful and just.

PRACTICING "IN THE INTERESTS OF JUSTICE" IN THE TWENTY-FIRST CENTURY: PURSUING PEACE AS JUSTICE

Carrie Menkel-Meadow*

"The core mission of the legal profession is the pursuit of justice, through the resolution of conflict or the orderly and civilized righting of wrongs."¹

When I was a young law student, then a legal services attorney and finally a clinical law teacher, practicing "in the interests of justice" often meant either winning a legal case for a particular disadvantaged person or moving a legal precedent once inch forward in a larger law reform campaign for a cause.² Justice—whatever it means

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A good portion of this essay was written just before September 11, 2001, and the rest of it was completed afterward. I have begun to think that all "texts" will suffer from a new "deconstructive" and interpretative frame—things written before and after 9/11/01. To call for problem solving and peacemaking in lawyering here seems to heighten this interpretative issue of when fights, wars and resistance are important and when peace and more conciliatory problem solving are appropriate. I hope that as these events scar us and rearrange the salient "memes" in our heads we will continue to explore the complexities of analyzing responses to different kinds of conflicts, disputes and problems in the world. On the one hand, internal, domestic legal disputes are different from international conflict and terrorism. On the other hand, since I believe we are now fighting our first "post-modern" war in which nation-states and clear "adversaries" are not coherent but more multi-national and "viral," the powerful memes and metaphors we use to try to understand what has happened and what should happen will likely "spill over" into many different areas. (Are we to appreciate our "oneness" with our fellow sufferers and citizens or be ever "alert" to the possible "treason" of a seemingly peaceful member of our community?)

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1. Howard Gardner et al., *Good Work: When Excellence and Ethics Meet* 10 (2001).

2. See Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward An Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *Cause Lawyering: Political Commitments and Professional Responsibilities* 31 (Austin Sarat & Stuart A. Scheingold eds., 1998).

philosophically and practically—was tied expressly to law: legal cases and precedents, statutes and regulations. In other words, the purpose of practice was to achieve some sense of righteous equity in human conditions through the use of law and legal rights.

Early in my own practice I saw that legal victories were often Pyrrhic—the particular legal battle might easily be won (such as in a summary judgment declaring some institutional practice discriminatory, ultra vires or unconstitutional and, therefore, void) but the underlying social, economic or political relations between the parties would not change substantially. I learned this lesson in my own practice through cases brought against welfare departments, educational systems, prisons and employers. Somewhat ironically, lawsuits against public and state agencies were easier to win, in large measure because the state action doctrine of the early 1970s made applicability of a variety of constitutional and federal legislation principles more stringent against public entities than against private actors.³ I say ironically, because, even then, I thought that most private actors (large private corporations, small minded “small businesses,” private landlords, private schools and family members) were often responsible for far more economic, social and political harm to people suffering from “injustice” than public institutions where enforcement of public norms was more likely to be self-executing. Now, with the sophistication of a social scientist, I know that this is a complicated empirical question. Different sectors of the economy and society are more or less likely to be committed to social justice than the simple “public-private” dichotomy predicts or explains. And, clearly, different segments of both the public and private spheres have been differentially compliant with and sensitive to legal changes mandated by statutes, regulations and lawsuits.

What I did learn from my early years of law practice was that compliance with legal mandates was variable (I know this also as a law and society scholar)⁴ and did not necessarily mean that “justice” had been achieved. Legal philosophers continue to debate and discuss whether legal justice is coterminous with social justice or morality;⁵ social scientists attempt to study and explain what the acted-upon

3. See Symposium, *The Public/Private Distinction*, 130 U. Pa. L. Rev. 1289 (1982).

4. For a discussion of studies of legal compliance with regulatory law, see Keith Hawkins & John M. Thomas, *Enforcing Regulation* (1984). For a discussion of so called “gap studies,” which examine the differences between “law on the books” and “law in action,” see Richard L. Abel, *Law Books and Books About Law*, 26 Stan. L. Rev. 175 (1973) (reviewing Max Rheinstein, *Marriage Stability, Divorce and the Law* (1972)).

5. See, e.g., Ronald M. Dworkin, *Taking Rights Seriously* (1977); Lon L. Fuller, *The Morality of Law* (1964); H.L.A. Hart, *The Concept of Law* (1961); David Luban, *Lawyers and Justice: An Ethical Study* (1988); John Rawls, *A Theory of Justice* (1971).

consider as felt or experienced "justice";⁶ and practicing lawyers continue to appeal for justice as a core value of the legal system—to urge legal decision makers to grant them what they want. Indeed, justice, it is often claimed, emerges only when lawyers and their clients argue over its meaning and, in turn, some authoritative figure or body pronounces on its meaning, such as in the canonical cases of the late twentieth century, *Brown v. Board of Education*⁷ and *Roe v. Wade*.⁸

For many years now, I have suggested that there are other components to the achievement of justice. Most notably, I refer to the process by which we seek justice (party participation and empowerment, consensus rather than compromise or command)⁹ and the particular types of outcomes that might help to achieve it (not binary win-lose solutions, but creative, pie-expanding or even shared solutions).¹⁰ Without recounting here the full arguments made about the advantages and disadvantages of "alternative" (I now say "appropriate") dispute resolution, it is clear that many advocates of "justice" think that, by and large, more "consensually" based legal processes are inadequate to achieve their versions of social justice.¹¹ Indeed, one well-known critic has accused these processes of developing a "harmony" ideology which is antithetical to the achievement of some forms of social and legal justice.¹²

In these comments I suggest that in our current world, both international and domestic, practicing "in the interests of justice" includes—indeed, should give great priority to—the "peace-seeking" and "problem solving" aspects of lawyering. I continue to see this as counter-cultural to the more common practices of lawyers who are argumentative, persuasive and articulate debaters, who believe fervently and vigorously that seeking justice, on behalf of a client or cause, means advocating for and "winning" a legal claim. To the contrary, seeking peace for parties (and, indeed, nation-states) in conflict, searching for consensus solutions to seemingly intractable public policy and legal disputes and creatively negotiating new relationships, transactions, partnerships and entities are all, for me,

6. See, e.g., Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories From Everyday Life* (1998); E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (1988); Tom Tyler et al., *Social Justice in a Diverse Society* (1997).

7. 347 U.S. 483 (1954).

8. 410 U.S. 113 (1973).

9. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. Rev. 754 (1984).

10. Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 Harv. Negot. L. Rev. 97 (2001).

11. This, in my view, includes Deborah Rhode's treatment of the issue in *In The Interests of Justice: Reforming the Legal Profession* 131-35 (2000).

12. Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 Ohio St. J. on Disp. Resol. 1 (1993).

essential parts of practicing "in the interests of justice." I will try to elaborate why I think so, briefly, here.

In a recent address to another law school in this city, former President Clinton, upon accepting the Second Annual Cardozo International Advocate for Peace Award, said, "Throughout human history, tragically, we have seen more advances in tools for waging war than in the art of making peace."¹³ That comment, while certainly true of human behavior in general, is applicable to legal behavior as well. We have developed more and more sophisticated forms of legal warfare (discovery and the paper wars of attrition, and, my personal favorite, the recent ad of the Los Angeles Intercontinental Hotel for a "litigation war room" available for lawyers planning strategy, taking depositions and developing their "battle plans," all in facilities with completely up-to-date technology and "close to the battlefield"—the courthouse).¹⁴ Fortunately, I think we have also seen some advances in developing some tools for "making peace" with the proliferation of mediation,¹⁵ problem solving and interest-based negotiation,¹⁶ negotiated rule-making¹⁷ and a variety of consensus building processes,¹⁸ as well as problem-solving courts in a variety of substantive areas.¹⁹ These new tools are intended, in my view, to seek peace and justice simultaneously through the use of a variety of different forms of dialogue, policy-making, rule development, dispute settlement and conflict management. As I now tell my colleagues in a variety of substantive areas, if we cannot make enough peace and quiet to have a reasonable dialogue with each other (see by contrast the continuing violence in the troubled spots of the world) we will not be able to seek justice, let alone substantive solutions to any of our

13. William Jefferson Clinton, Address on the Occasion of the Second Annual International Advocate for Peace Award, Mar. 19, 2001, Cardozo Online Journal of Conflict Resolution, at <http://www.cordozo.yu.edu/cojcr/final%5Fsite/iap%Faward/2001/clintontrans.htm>.

14. Intercontinental Hotel advertisement in National Law Journal, Nat'l L. J., April 10, 2000, at A8.

15. Mediation: Theory, Policy and Practice (Carrie Menkel-Meadow ed., 2001) [hereinafter *Mediation*].

16. Roger Fisher et al., *Getting to YES: Negotiating Agreement Without Giving In* (2nd ed. 1991); Robert H. Mnookin, et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2000).

17. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997); Philip J. Harter, *Negotiating Regulations: A Cure for the Malaise*, 71 Geo. L.J. 1 (1982); cf. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke L. J. 1255 (1997).

18. Susan L. Carpenter & W.J.D. Kennedy, *Managing Public Disputes* (2nd ed. 2001); Lawrence Susskind et al., *The Consensus Building Handbook* (1999).

19. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 Law & Pol'y 125 (2001); Michael Dorf & Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 Vand. L. Rev. 831 (2000); Judith Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 Hastings L.J. 851 (1997).

problems.²⁰ Peace, of at least some minimal sort, is a prerequisite to the search for justice.²¹ And to the extent that peace-seeking tools are part of what I would call "process consciousness," lawyers should be—but are not yet, by disposition or training—at the forefront of practicing justice by considering and shaping processes that are more likely to lead to peaceful and better outcomes.²²

I. FIRST PRINCIPLES

"The pursuit of justice" is one of those legal tropes or mantras that we often invoke to describe the mission of our profession.²³ Much philosophical ink has been spilled on the subject of what justice consists of, in its various forms: distributive, equitable, principled. When the pursuit of justice is linked to the practice of law at least three other foundational values are often similarly declaimed: justice through the "rule of law, not men," "equal access to justice" (and "equality before the law") and the importance of "fair process" in achieving justice.

While others are busily re-examining the meaning of the "rule of law" limitation on the rule of men²⁴ (it is, after all, men and women, these days, who make, enforce, interpret, break or ignore the law), the "rule of law" has for some time now been criticized as the best or even the only way to achieve justice.²⁵ As some Critical Legal Studies scholars argued years ago, a reliance on legal rights, whether in the enforcement of "old" laws or in the "creation" of new laws or rights was likely to be inadequate, and in some cases, positively counterproductive to the achievement of a deeper and more far-

20. This principle is embodied in the Mitchell Report. Report of the Sharm El-Sheikh Fact-Finding Committee (Mitchell Report) (April 30, 2001), <http://usinfo.state.gov/regional/nea/mitchell.htm> (get the parties to talk, build confidence and trust slowly to build more substantive solutions). The Mitchell principles, suggested for Mid-east peace talks, are derived, in part, from Mitchell's experience as mediator in the Northern Ireland peace process. See George J. Mitchell, *Making Peace* (1999).

21. There is of course a long and powerful tradition of violent revolutions seeking social justice, see Crane Brinton, *The Anatomy of Revolution* (Rev. ed. 1965), and also a strong tradition of non-violent passive resistance in social justice movements. See, e.g., Peter Ackerman & Jack DuVall, *A Force More Powerful: A Century of Nonviolent Conflict* (2000); Paul Erenst Wehr et al., *Justice Without Violence* (1994); Martin Luther King, Jr. Letter From a Birmingham Jail (April 16, 1963).

22. Carrie Menkel-Meadow, *The Lawyer's Role in Deliberative Democracy* (2001) (unpublished manuscript, on file with author).

23. This raises interesting questions about who defines the mission of a profession, those inside, or *emic* versions as anthropologists would describe it, or those outside (*etic* versions). How would those served by lawyers (clients or "the public") describe our mission? (Perhaps to right wrongs or win cases but probably less often to "pursue justice.")

24. See, e.g., Robin West, *Rethinking the Rule of Law* (2001) (unpublished manuscript, on file with author).

25. The quote that appears on the edifice of the Edward Bennett Williams Law Library (attributed to a Georgetown student) is "Justice is the end, law is the means."

reaching social justice. Whether in the reliance on the state to recognize or enforce laws and rights, or in the alienation that is derived from the "abstractions" of law and legal principles or in the focus on individual, rather than collectivized, rights holders and enforcers, the equation of legal rights with justice seemed hollow (in the 1980s at least) to many legal theorists and progressive activists.²⁶

Enforcement and creation of legal rights depends, in large measure, on using the apparatus of the legal system (courts, legislatures and administrative agencies) and all too often, as Deborah Rhode's work has demonstrated,²⁷ on the apparatchiks of the system—legal professionals. Thus, whether through arcane principles (laws, arguments, rules) or processes (litigation, rule-making, lobbying) the pursuit of justice has become "over-professionalized" and inaccessible to many within a self-proclaiming successful democracy.

My own work has been focused on how little legal endowments or remedies may actually address what parties to legal disputes or conflicts actually desire or need.²⁸ In short, I might ask—is "legal justice" (conformity to legal rules, principles and remedies) the same thing as "social" or even "individual justice"? When might parties engaged with each other (whether in disputatious or other contexts) desire things that are neither legally prescribed nor proscribed?

For other critics, American justice has been overly concerned with procedure or process, whether in the arcane arrangements of governance structure provided by the Constitution or in the more multi-layered process jurisprudence of the legal process school exemplified by Lon Fuller and others. More recently, the British social philosopher, Stuart Hampshire, long concerned with substantive justice issues, has opined that since we will never reach agreement on the substantive good in a modern (and post-modern) multiply plural world, the best we can hope for is agreement about the search for the just and fair through a common procedural understanding of *audi alteram partem*, or "hear the other side." Hampshire makes a claim for the justice of the adversary system as perhaps Western civilization's greatest achievement. While I mostly agree with Hampshire's focus on procedural justice, I want to suggest here, as elsewhere,²⁹ that his view of the effectiveness of adversarial argument for achieving justice ("justice is conflict") is too narrow and crabbed. Perhaps my version of his argument would be "conflict is justice," only if we recognize that: 1) "conflict" or arguments exist in more

26. See, e.g., Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 Tex. L. Rev. 1563 (1984); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 Stan. L. Rev. 1 (1984); Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984).

27. Rhode, *supra* note 11, at 135-41.

28. See Menkel-Meadow, *supra* note 9; Menkel-Meadow, *supra* note 10.

29. See Menkel-Meadow, *supra* note 22.

than polarized, binary forms (there are many “sides” to a conflict so we will have to hear more than “both sides”); 2) the processes or forms of “conflict handling” (not resolution) need not be exclusively “adversarial”; and 3) in those other “conflict resolving” processes we seek to achieve “peaceful” coexistence, mutual understanding and justice simultaneously.³⁰

Thus, for me, first principles about the pursuit of justice suggest that there are both substantive and procedural dimensions to justice and that “legal justice” may not be capacious enough to include all that I would consider just. In the remaining pages of this essay, I want to suggest that it is not enough to “reform the legal profession” from within conventional, limited and stilted conceptions of “legal justice” or professional responsibility reforms. Because I believe justice is bigger and more complex than both “legal justice” and legal ethics, and includes a set of values in addition to those commonly associated with legal justice, the lawyer’s role in “pursuing justice” must expand to pursuing other forms of actions—including peace-seeking, consensus-building and problem-solving, as well as our more conventional roles of advocacy and representation. Here I will briefly explore two different fora where lawyers might perform such work: with clients in concrete legal disputes and with larger social groups that seek to resolve social, political and even international policy issues.

II. “PEACE WORK” AND PROBLEM SOLVING WITH CLIENTS

In their recent book exploring the content of “good work,” social, cognitive and developmental psychologists Howard Gardner, Mihaly Csikszentmihalyi, and William Damon explore the dimensions of professions that “align” their mission, standards, practices, identities and ethics.³¹ Though the authors do not focus on the legal profession,³² they do specify the mission of the legal profession as “the

30. This is the part that gets harder after 9/11/01. Is “mutual understanding” always possible? Desirable? Are there moral absolutes that prevent “peaceful coexistence” in some arenas? Note how quickly our leadership fell into the conventional American adversarial “trap” by totally demonizing “the evil ones.” At the other extreme, life-long peace activists sought rational messages and connections in the actions of the terrorists (world distributional inequalities, connections to anti-globalists in World Trade disputes and protests) that also, in my view, simplify the “conflict.”

31. Howard Gardner et al., *supra* note 1.

32. They examine one profession that is in alignment—genetics—and one that is not—journalism. The legal profession can find itself by analogy easily in the same challenges facing journalism: increased focus on market and “bottom line” values, changing technologies and “speed-up” of information processing, control by others over work with loss of professional autonomy, less than adequate mentoring and role-modeling, extensive rewards for status, wealth and celebrity in what is supposed to be an intrinsically valuable “cerebral” profession and increased competition with new entrants to the field. *Id.* at 125-206.

pursuit of justice through the resolution of conflict [or the civil righting of wrongs]." While most who praise the work of lawyers as justice seekers tend to focus on the latter ("righting of wrongs" through litigation or legislation), others of us have suggested for about twenty years or more that the pursuit of justice may also be served by the resolution of conflicts, whether between individuals, between individuals and either public or private institutions, or even between two or more institutions. Thus, while the default assumption about the work of lawyers is adversary representation,³³ mediators and other lawyer-conflict resolvers have identified themselves as "alternative" to both conceptions: "representation" and "adversarial."³⁴ For these lawyers (and a new group called "collaborative" lawyers³⁵) the lawyer pursues justice by "seeking to reorient the parties to each other"³⁶ (in both relationship-enhancing and substantive terms).

The work of the lawyer as a conflict resolver is to explore not only legal, but also other needs and interests of the parties (including economic, social, psychological, political, religious, moral and ethical concerns). Utilizing theories, not only of law, but of human behavior (sociology, psychology and economics), lawyers as conflict professionals look for situations where these diverse needs and interests do not compete with each other (the assumption of the legal system that "money is proxy" for all other, often non-economic, interests) but complement each other (the "Homans principle").³⁷ Complementary needs permit "efficient trades" (Pareto-optimal in economic parlance) or "log-rolling" (in the language of political scientists)—positive-sum, rather than zero-sum results. Thus, at the level of substantive problem solving, lawyers seeking to achieve both maximum gain for individual clients and joint gain for all involved in a particular situation, must employ different kinds of cognitive processes and different technologies and techniques in order to fashion good and lasting solutions to disputes and conflicts. At the relational level, where legal disputes and conflicts either begin with or accumulate a large emotional "residue" of resentment, anger and a sense of injustice, (and, therefore, demand for both compensation and

33. See, e.g., David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, Legal Affairs (forthcoming 2002).

34. See, e.g., Carrie Menkel-Meadow, *Ethics and Professionalism in Non-adversarial Lawyering*, 27 Fla. St. U. L. Rev. 153 (1999); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 Temple L. Rev. 785 (1999).

35. Pauline H. Tesler, *Collaborative Law* (2001); Robert W. Rack, Jr., *Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation*, Disp. Resol. Magazine, Summer 1998, at 8.

36. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305 (1971).

37. Named for the sociologist George Homans who noted the complementarity of human needs (after basic Maslovian survival needs are met). George Caspar Homans, *Social Behavior: Its Elementary Forms* (Rev. ed. 1974).

retribution), skilled lawyers as peace-makers must develop different kinds of communication skills than the traditional forms of argument, debate and adversarial claiming.³⁸

Lawyers interested in pursuing "resolution of human problems" as a dimension of justice (beyond the winning of a legal case) can perform such roles in different ways. Not all pursuers of justice in individual cases are mediators. Serving as the "representative" (restoring one of the lawyer's more conventional roles) in a mediation, a lawyer may still serve a client who needs assistance in stating a claim or articulating a need or interest, but will also have to develop a different mind-set of approaching the other side and seeking creative (perhaps beyond precedent and boilerplate) solutions to problems.³⁹ For the jurisprudentially sensitive lawyer-conflict resolver, the question of justice in a mediative setting may be framed by asking the parties to reflect on what is "fair" to them. In the words of my friend and mediator-collaborator, Gary Friedman, "law may be relevant, but not determinative"⁴⁰ of what is fair to each party. From a Legal Realist perspective, it may be useful to remember that legislatures write laws for the general good (seeking the "golden mean" of regulation for the majority of actors). The general law may not serve "justice" in an individual case and so, as long as not otherwise unlawful, individual or party-tailored solutions to legal disputes or problems may depart from particular legal formulations.⁴¹ Legal or "legislated justice" may not always be the same as personal or social justice between parties. Consider as examples: mutually agreed to departures from court-suggested spousal and child support guidelines, departures from sentencing guidelines, liquidated damages clauses in contracts and all future-oriented solutions to disrupted past dealings in both business and personal relationships.⁴² Lawyers seeking this kind of "individual" justice between parties (where no important public issue demands transparency or where the parties prefer a highly individualized and flexible, future-oriented solution to their problem) seek both a better quality solution and a more lasting

38. See, e.g., Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation* (1994); Douglas Stone et al., *Difficult Conversations: How To Discuss What Matters Most* (1999).

39. See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 Ohio St. J. on Disp. Resol. 269 (1999).

40. Gary Friedman & Jack Himmelstein, Center for Mediation in Law, Training Materials, *The Place of Law in Mediation* (2001).

41. Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 Hofstra L. Rev. 905 (2000).

42. For a true to life example of how a complex and highly contested legal dispute was transformed into a joint venture see the description of the *Digital vs. Intel* patent infringement litigation in Mnookin et al., *supra* note 16, at 243-48.

"peace" between the parties⁴³ than a "command" order of court is likely to accomplish.⁴⁴

This is not to say that all "alternative dispute resolution" is necessarily more individually just than traditional litigation. Indeed, I have been critical of very problematic distortions of the "ADR" process that inhibit several important justice values: access to justice and fairness, particularly in the form of mandatory arbitration clauses in a variety of settings, ranging from employment to consumer contracts to health care,⁴⁵ which remove process choice, may be prohibitively costly and provide inadequate representation and remedies to harmed individuals. Claims about the fairness and "justice" of all forms of process must be considered both for what they promise and do internally, as well as in relation to what else is available—"the baseline" problem in evaluating relative fairness of legal processes to each other. The best and worst of different processes should not be compared to each other but best to best and worst to worst of each process. Ideally, we should be able to measure differences and understand the reasons for when and how justice is delivered in different settings (and sometimes differentially for different people).⁴⁶

III. "SOCIAL WORK" AND PROBLEM SOLVING IN THE POLITY

There are those who continue to question both the efficacy⁴⁷ and the legitimacy⁴⁸ of privatized peacemaking in all lawyer directed

43. Indeed, one group of legal mediators has disclaimed any need to "resolve" disputes or make settlements, but instead seeks to enhance human understanding through "recognition and empowerment" whether or not an actual agreement is reached. See Bush & Folger, *supra* note 38. For my critique of this "either-or" approach to the mission and goals of legal mediation, see Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 Negot. J. 217 (1995).

44. For examples of many studies documenting the greater efficacy and enforcement rates of mediated solutions to court ordered solutions in a variety of contexts, see Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 Me. L. Rev. 237 (1981), Jessica Pearson & Nancy Thoennes, Final Report of the Divorce Mediation Research Project (1984), and, more recently, Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 Ohio St. J. on Disp. Resol. 1 (1998).

45. Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio J. on Disp. Resol. 19 (1999); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted of "The Law of ADR"*, 19 Fla. St. U. L. Rev. 1 (1991).

46. Not all parties want public hearings. My work in women's health cases demonstrates that some individuals actually prefer private justice. See Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 Loy. L.A. L. Rev. 513 (1998).

47. See, e.g., James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (1996); James S. Kakalik et

mediation. If all "justice" is to be pursued in public settings with transparency for all affected (going beyond those in the dispute, to include all those who might be affected by it),⁴⁹ there are also different roles for lawyers to play in achieving not only peace and justice, but greater legitimacy with respect to results. Without recounting it fully here, a new body of legal theory has developed around the application of such political theories as Habermas's "ideal speech conditions"⁵⁰ and new models of "deliberative democracy"⁵¹ to provide the foundational underpinnings for a different form of legal practice which seeks to "pursue justice" with different processes. By expanding mediational, problem solving concepts to the development of new processes and institutions, lawyers and other public policy advocates have been engaged for some time now in the pursuit of new forms of law-making, decision-making, community and participatory democracy. Whether called "consensus building fora," negotiated rule-makings ("reg-neg") or public dispute management events, new fora have developed to respond to a host of legal and political conflicts including environmental siting, regulation drafting, budget allocation, international treaties, municipal governance, and community and diversity disputes. These new forms of action seek to achieve "just," as well as more peaceful, less acrimonious and more lasting solutions to multi-faceted problems by employing processes that differ considerably from the conventional ways in which lawyers seek to pursue justice.

Recognizing that most modern legal and social disputes engage more than two parties, such processes require conflict assessment and invitations for participation by a multiplicity of "stakeholders" to a problem, including representatives of such non-litigants as "future generations," potentially affected parties and others who might not

al., Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act (1996); Donna Stienstra et al., Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990 (1997); Elizabeth Plapinger, *RAND Study of Civil Justice Reform Act Sparks Debate*, Nat'l L. J. Mar. 24, 1997 at B-18.

48. See, e.g., Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619 (1995). Of course, those who continue to fault "private settlements" continue to assume that courts consider public consequences, even in private disputes that are litigated, despite the fact that courts continue to claim that "policy making" is for legislatures and not for the courts and despite the fact that standing and other doctrines have severely limited what "public" issues may even be litigated.

49. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 Geo. L.J. 2663 (1995).

50. Jurgen Habermas, *A Theory of Communicative Action* (Thomas McCarthy trans., 1984); Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans., 1996).

51. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998).

have conventional "standing" in a lawsuit. Although "facilitated" by some kind of neutral process expert (an ideal role for a procedure-minded lawyer), typically such processes involve the parties themselves in setting the rules of process and decision.⁵² Such democracy in action must confront whether unanimity, super-majorities or other forms of "consensus" decision rules will govern, but the parties make decisions themselves about how they will resolve a contested matter. With rules for shared speaking and a focus on "interests" or "needs" rather than positions, parties, as well as their representatives and lawyers, directly participate in such processes. After airing grievances and listing agenda items, such groups often move into guided exercises based on brainstorming, problem-solving, and tasks that facilitate solutions to resource and value conflicts and dilemmas that come from the parties themselves, rather than from an outsider. (In some variations of these processes, mediators can be asked to turn into evaluators or arbitrators or expertise can be marshaled either in the form of providing information or rendering a decision, but the choice to do this resides with the parties.) While these processes certainly have their critics and detractors too,⁵³ their procedures are increasingly being applied to a wide variety of social, legal and political problems,⁵⁴ beyond American domestic concerns and into the international arena, including such issues as deteriorating adversarialism in Congress,⁵⁵ and global warming and international environmental accords.⁵⁶ Even new courts have borrowed from the conceptual base of this multi-partied, multi-issue focus on problem solving. Drug courts, integrated family courts, community courts and "vice" courts now seek multi-faceted solutions to solving the "underlying problems" that often present themselves as single issues or disputes in a criminal court (addiction, lack of resources and social services). These courts, which attempt to focus on the "whole person" and also combine punishment with efforts at rehabilitation, certainly have their critics among the more adversarially minded criminal defense lawyers and prosecutors,⁵⁷ to whom individuals must concede

52. For one thoughtful summary of such ground rules, designed to replace Robert's Rules of Order, see Susskind, *supra* note 18 at 3-57.

53. See, e.g., Coglianese, *supra* note 17.

54. Lawrence Susskind & Liora Zion, *Strengthening the Democratic Process in the United States: An Examination of Recent Experiments* (2001) (unpublished manuscript, on file with author).

55. See Richard Gephardt describing his role as House Minority Leader by saying: "Our job is to resolve conflict, knowing that the conflict will never truly be resolved." Roll Call, Mar. 6, 1997 (commenting on "harmony" retreats in Hershey, Pennsylvania).

56. Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature*, Mar. 16, 1998, available at <http://www.unfccc.int/resource/docs/convkp/kpeng.pdf>.

57. See, e.g., Anthony C. Thompson, *Courting Disorder: Some Thoughts on Problem Solving Courts*, 10 Wash. U. J.L. & Pol'y (forthcoming 2002).

"guilt" before they can receive treatment (derived from the principles of the earlier restorative justice movement).⁵⁸

Lawyers, as I have argued at greater length elsewhere,⁵⁹ may be particularly well suited to participating in these new processes. Lawyers have "process consciousness." Aware of procedural rules and concerned about "voice" and procedural fairness, with proper training (facilitation is quite different from argumentation), lawyers may make ideal process leaders of these new processes and institutions. To the extent that efforts at collaboration and community and democratic decision making still implicate legal requirements (siting disputes require zoning and environmental approvals from formal legal authorities), lawyers are well suited to spot the legal issues and provide for their appropriate coordination with less formal processes. To the extent that these new processes are experiments in constitution-making (as some legal scholars have named them)⁶⁰ or simply more direct democratic enterprises than local and national and international government is accustomed to, law-trained individuals may be particularly well suited to serving in these processes, whether as "neutral-facilitators" or advocates or party representatives.

These new roles put lawyers in perhaps unfamiliar ways of functioning as they pursue justice. Focused not just on "winning" the case, but on meeting the needs of multiple sets of parties and affected third parties, and on looking for substantive solutions that will require marshaling new resources, drafting new regulations, creating new institutions (including public and private partnerships in some cases) and implementing and enforcing plans, lawyers will have to learn new skills and develop new conceptual frameworks. It will not be easy to do all of this, particularly in light of robust conventional frames and conceptual models through which we process the world, and because our system is more than several centuries old. But, if I can take anything useful out of the recent events that have hurt us so badly, it is clear we are living in a new world with new problems that will require new forms of processes and solutions if we are to achieve a peaceful and just world. If necessity is the mother of invention, we are certainly in need of the birth of some new ideas for pursuing justice, both at home and in the larger world we now all inhabit. Conventional approaches to pursuing "justice" like our "conventional" approaches of military solutions to international problems may destroy the very "res" we are fighting about.

58. See David Lerman, *Restoring Justice*, 14 Tikkun 13 (1999); Mark Umbreit, *Mediation of Victim Offender Conflict*, 1988 Mo. J. Disp. Res. 85. For an account of different remedial philosophies in criminal sentencing, see Pamela Utz, *Settling the Facts* (1978).

59. See Mediation, *supra* note 15.

60. Dorf & Sabel, *supra* note 51.

(Producing a “negative sum” game in negotiation parlance). Just as military solutions to “war” may not bring us peace, an exclusive focus on “legal” needs and interests may not bring us justice. This is true, whether we like it or not.